Lansco Corp. v AB Marbec Realty Corp.
2018 NY Slip Op 30259(U)
February 7, 2018
Supreme Court, New York County
Docket Number: 655743/2016
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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THE LANSCO CORPORATION AND SHOLOM AND ZUCKERBROT REALTY LLC,

Plaintiffs,

- against -

AB MARBEC REALTY CORP.,

Defendant.

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Index Number: 655743/2016

Sequence Number: 001

Decision and Order:

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 6, were used on this motion by plaintiff for summary judgment, and cross-motion by plaintiff/counter-claim defendant for summary judgment.

	Papers Numbered:
Moving Papers	1
Opposing Papers	2
Reply Papers	3
Cross-Moving Papers	4
Cross-Moving Opposing Papers	5
Cross-Moving Reply Papers	6

Upon the foregoing papers, the motion and cross-motion are granted.

Background

Plaintiffs, The Lansco Corporation ("Lansco") and Sholom and Zuckerbrot ("S&Z"), are licensed real estate brokers. Defendant AB Marbec Realty Corp. ("Marbec") owns the building at and known as 42-51 and 42-61 24th Street, Long Island City, New York ("The Building"). Avrohom Becker ("Becker") is defendant's principal.

In 2012 Lansco was working to find space to lease for non-party Downing Frames Inc. ("Downing"), whose principal is Clint Downing. Lansco, which operates primarily in Manhattan, contacted S&Z, which is located in and services the Long Island City area. S&Z informed Downing that space was available in The Building. In or about mid-2012 Clint Downing and representatives of S&Z and Lansco inspected The Building, with Becker present. Pursuant to a lease dated May 22, 2012 ("The Lease"), Downing rented a portion of the third floor of The Building for a term of five years. Shortly prior

thereto, Marbec, Lansco and S&Z entered into a brokerage agreement ("The Brokerage Agreement")[1], which provided for a commission of $26,853, which plaintiffs were to split evenly. Marbec paid the full amount of the commission to S&Z, which gave half of the money to Lansco.

Paragraph 4 of The Brokerage Agreement provides, as here relevant, as follows:

> In the event Tenant ...(a) renews or extends its lease, or enters into a new lease, ... ; or (b) takes additional space at the property; then Owner shall pay Brokers additional commissions in the amount of three (3%) percent of the gross aggregate rental ... , which commission shall be earned, due and payable upon ... the execution of documents evidencing such transaction. * * *

Pursuant to a rider to The Lease, dated May 30, 2014 ("Rider"), Downing leased a portion of the First Floor of The Building and paid rent thereon. Pursuant thereto, Marbec paid S&Z a commission of $2,646.00 (plus, it appears, an additional $90). Pursuant to a second rider to the lease, dated June 23, 2016 ("Second Rider"; collectively "The Riders"), Downing rented the second floor of The Building for a term of five years, at a specified, escalating rent. The Second Rider also extended Downing's lease of the third floor for another four years, to be "co-terminus" with the lease of second-floor space, ending June 30, 2021. Apparently, Downing has been paying rent for its space on the second floor but has abandoned the third floor. In early November 2016 plaintiffs' counsel received a copy of a letter from Marbec to Lansco purporting to enclose a check for $4,476 for "commission of 3% for the year rent for Downing ... ." According to plaintiffs, (1) the original of the letter, and the check, never reached Lansco, which had moved its offices; (2) defendant did not explain, and plaintiff did not understand, how defendant came up with the $4,476 amount; (3) the commission was due for the entire four-year (third floor) and five-year (second floor) term, not for one year; and (4) by paying, or at least attempting to pay, this money, defendant acknowledged that a commission was due.

At some point in 2016 Clint contacted S&Z about renting additional space in a nearby building, but that did not happen. At some point prior to the second rider being signed, S&Z told Clint Downing that The Building was for sale. Clint Downing asked Becker if this was true; Becker denied it; and Clint entered into the second rider.

Plaintiffs have set forth a calculation (Eliasoph Moving Affidavit ¶ 27) purporting to indicate that defendant owes them $44,273.34. Defendant has not controverted the calculation as such, but claims that it owes nothing, and that plaintiffs are obligated to return the commissions that defendant has paid them.

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[1] Plaintiff cleverly refer to this agreement as "The Commission Agreement." They e-filed it with the court as "Commission agreement." The document itself does not have a formal title. However, the first words thereof state that "[t]he following sets forth the brokerage agreement between [S&Z] and [Lansco] and [Marbec] ... ." Defendant refers to the agreement, more accurately, as the "brokerage agreement." However, what controls is the substance, not the nomenclature.

Plaintiff now moves, and plaintiff/counterclaim defendant now cross-moves, for summary judgment in the amount of $44,273.34, plus interest from June 23, 2016; to dismiss defendant's counterclaims; and for an assessment of contractual attorney's fees.

Discussion

Defendant may or may not be relying on the fact that after receiving signed agreements from Downing, defendant did not send counter-signed agreements back to Downing. Any such argument would be unavailing. The leases became effect upon Downing signing them and sending them back to Marbec; the commissions became due at that moment; Marbec has been receiving rent for at least some of the spaces at issue; defendant has even paid, and has attempted to pay, commissions on The Lease and The Riders; any non-compliance by Downing with its lease obligations would not defeat plaintiffs' right to a commission due upon execution of the lease and/or riders. See Hecht v Meller, 23 NY2d 301 (1968); Lane-The Real Estate Dept. Store, Inc. v Lawlett Corp. 28 NY2d 36 (1971) ("at the point the broker produces an acceptable buyer he has fully performed and his right to commission becomes enforceable"). Here, the brokers have produced much more than an acceptable third-party ("buyer"); they have produced a third-party who signed a lease and paid rent (or, at least, was obligated to do so).

Defendant argues that plaintiffs, or at least S&Z, was its fiduciary. There is nothing in The Brokerage Agreement, or in the course of the parties dealings, that remotely supports this view. See generally, Sonnenschein v Douglas Elliman-Gibbons & Ives, 96 NY2d 369 (2001) (commission agreement does not equate to fiduciary relationship). The fact that, whatever the particulars were, plaintiffs approached Marbec with Downing as a possible tenant indicates that if plaintiffs owed a fiduciary duty, it was to Downing, not Marbec. Furthermore, The Brokerage Agreement did not prevent plaintiffs from continuing to look for other space for Downing.

Even if, arguendo, plaintiffs owed a fiduciary duty to Marbec, nothing they did damaged Marbec, because Downing and Marbec entered into The Lease and The Riders, and Marbec had the right fully to enforce them. The merger clause in the Brokerage Agreement (which could only be amended by a writing, but never was) also defeats any claim by Marbec that plaintiffs owed Marbec a fiduciary duty, a phrase and a concept nowhere present therein.

The counterclaims, based on a breach of fiduciary duty, must fall because there was no such duty, and, also, because the alleged breach caused no damage, inasmuch as Downing extended its third floor lease and leased the second floor.

Nothing in The Lease, The Brokerage Agreement, or the parties' course of dealings prevented S&Z from attempting to act as a broker for Downing to obtain space outside of The Building. S&Z's telling Downing that Becker was going to sell the building was fair game, not dirty pool.

Becker claims (Aff. ¶ 38) that he "retain[ed] S&Z and Lansco … to procure a tenant for the space." But the fact of the matter is that Downing was Lansco's client and principal; Lansco, with help from S&Z, introduced Downing to Becker and Long Island City; Becker never claims to have asked Lansco to find a tenant.

Defendant attempts to make much of the fact that the Complaint (¶ 7) states that plaintiffs "acted as brokers in procuring Downing … as a tenant." This leads defendant to say (Becker Aff. ¶ 40) that

plaintiffs "have admitted ... that they were AB Marbec's brokers ... ." Obviously, plaintiffs never said or implied that they were "Marbec's brokers." In any event, what brokers do in order to earn their commissions is match landlords and tenants. Here, plaintiffs came to Marbec with a tenant; Marbec did not ask them to find one (or, at least, did not ask Lansco, which found the tenant). In any event, defendant agreed to pay and has not. The facts, not the specific words used, govern this case. As Judge Cardozo famously said in Wood v Lucy, Lady Duff-Gordon, 222 NY 88 (1917), "The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today."

Similarly, Becker claims (Aff. ¶ 42) that plaintiffs' "job as broker[s] was to procure a tenant rather than a space for Downing" (emphasis in original). This ignores a salient feature of The Brokerage Agreement: that defendant, not Downing was paying the commission. If plaintiffs only found space for Downing, rather than a tenant for the building, why would defendant, not Downing, be paying the commission? Indeed, if the Brokerage Agreement failed to say that plaintiffs' had found a tenant for The Building, defendant could claim that a lack of consideration rendered the agreement avoidable. So yes, plaintiffs were helping defendant, for a fee, but they were not defendant's principals or fiduciaries.

Becker's claim that his other tenants "drove harder bargains" when they heard that defendant was going to sell The Building simply is of no legal moment. Defendant has not pled, nor could it, a fraud/misrepresentation claim. And plaintiffs could not have breached a fiduciary duty that did not exist.

Clint Downing has submitted an affidavit in opposition, the main revelation of which is that in 2016, he initially approached S&Z, rather than the other way around, about expanding his business. So again, no duty to defendant, and hence no breach.

Although this case is still pre-Note of Issue, nothing that defendant could learn in deposing Eliasoph, or anyone else, would change the simple facts of this case: a "one-off" agreement and a failure to pay thereunder.

As the prevailing parties, pursuant to The Brokerage Agreement, ¶ 3, plaintiffs are entitled to attorney's fees.

The Court has considered defendant's other arguments and finds them to be unavailing and/or nondispositive.

Conclusion

Plaintiffs motion for summary judgment granted. The Clerk is hereby directed to enter judgment in favor of plaintiffs and against defendant in the amount of $44,273.34, plus interest from June 23, 2016. Plaintiff's request for reasonable attorney's fees and costs is hereby severed and referred to a special referee to hear and report (CPLR 4311). In order to obtain such a hearing, plaintiff may submit to Room 119 a copy of this Decision & Order and notice of entry, together with a Special Referee Info Sheet (http://nycourts.gov/courts/1jd/supctmanh/refpart-infosheet-10-09.pdf).

Dated: February 7, 2018

Arthur F. Engoron, J.S.C.